92-21

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KENDALL STOCKSTILL AND
MANUEL T. MAYEUX,

Petitioners,

v.

SHELL OIL COMPANY AND
COASTLINE CONSTRUCTION COMPANY

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Notice of Appeal which names the parties to the appeal in the caption of the Notice and further designates the parties by their individual case numbers in the body of the notice is sufficient to give fair notice of the individuals seeking the appeal and invoke the Appellate Court's jurisdiction.

2. Whether a second Notice of Appeal is necessary subsequent to the District Court's F.R.C.P. 54(b) Order when the appellants filed no motions after filing their first Notice of Appeal pursuant to F.R.A.P. 4(a)(2)(4).

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this proceeding.

Kendall Stockstill	– Petitioner
Manuel T. Mayeux	– Petitioner
Shell Oil Company	– Respondent
Coastline Construction Company	– Respondent

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No. _____

In The

Supreme Court of the United States

October Term, 1991

KENDALL STOCKSTILL AND
MANUEL T. MAYEUX,

Petitioners,

v.

SHELL OIL COMPANY AND
COASTLINE CONSTRUCTION COMPANY

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on September 4, 1991. The U.S.

Court of Appeals for the Fifth Circuit's denial of rehearing was rendered on March 30, 1992. Therefore, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

28 U.S C. Section 1254(1)

Federal Rules of Appellate Procedure 4(a)(2)(4)

Federal Rule of Civil Procedure 54(b)

STATEMENT OF THE CASE

Petitioners, KENDALL STOCKSTILL and MANUEL T. MAYEUX, were discharged by respondent COASTLINE CONSTRUCTION COMPANY (hereafter "Coastline"), at the request of SHELL OIL COMPANY (hereafter "Shell"). Although Coastline was the last one of a number of contractors the plaintiffs had worked for, petitioners had worked at Shell's East Bay facility for over 12 and 23 years respectively. Both petitioners are in the protected age group and were qualified for the positions they held.

For good reasons and belief, petitioners filed charges with the Equal Employment Opportunity Commission. Upon receipt of their right to sue letters, both petitioners filed separate complaints against the respondents alleging age discrimination and violation of the employment Retirement Income Security Act. On motion by respondent, Shell, the court consolidated the cases on April 22, 1991.

On June 24, 1991, petitioner KENDALL STOCKSTILL filed a separate complaint in State Court against respondent SHELL alleging defamation. The respondent, SHELL, then removed the State claim to Federal Court and consolidated the action with the previous complaints.

Thereafter, on July 16, 1991, respondents filed a motion for summary judgment which the court granted on September 4, 1991. The judgment, however, was only effective against the first two original complaints and did not affect the separate defamation claim filed by petitioner KENDALL STOCKSTILL.

The petitioners then filed a request for rehearing on September 19, 1991. The motion for rehearing was subsequently denied on October 10, 1991. Thereafter, a notice of appeal by petitioners was filed with the district court on October 16, 1991. Subsequent to the filing of the notice of appeal, the district court entered a partial judgment under Rule 54(b) on November 7, 1991.

On February 28, 1992, the Fifth Circuit Court of Appeals rendered a judgment dismissing petitioners' appeal for lack of jurisdiction. The reason assigned for the dismissal was that the notice of appeal was ineffective for failure to designate the parties taking the appeal. Furthermore, the Appellate Court stated that a notice of appeal filed prior to the entry of a Fed. R. Civ. P. 54(b) order was ineffective and required a second Notice of Appeal to be filed.

Petitioners' sought a rehearing in the Appellate Court on September 19, 1991. However, on March 30, 1992, the Court of Appeals for the Fifth Circuit denied the petition for rehearing.

ARGUMENT

In dismissing the petitioners' appeal for want of jurisdiction, the Appellate Court cited two reasons: failure to designate the parties taking the appeal, citing *Torres v. Oakland Scavenger Company,* 1085 S. Ct. 2405 (1988), and the failure to notice the appeal after entry of a Fed. R. Civ. P. 54(b) order, citing *Dibidale of Louisiana, Inc. v. American Bank and Trust Company,* 916 F.2d 300 (5th Cir. 1990). However, the decision to decline jurisdiction based upon those authorities is a departure from the reasoning of *Torres,* supra, and *Dibidale,* supra, as well as Fed. R. App. P. 4(a)(2)(4).

This Court in *Torres,* supra, held that the notice of appeal was ineffective to *Torres* inasmuch as his name was not among the other fifteen appellants' names in the caption of the notice or in the body of the Notice of Appeal. Furthermore, this Court stated that the requirements of the rules on Notice of Appeal are met by some designation that gives fair notice of the individuals seeking to appeal. Even if the Notice of Appeal filed by petitioner was not written as to the form provided in the Federal Rules of Appellate Procedure, this Court has held that a Notice of Appeal, although unartfully written should be considered the functional equivalent of a technically correct notice. *Torres,* supra, *Foreman v. Davis,* 371 U.S. 178, 83 S. Ct. 227 (1962), *Houston v. Zack,* 108 S. Ct. 2379 (1988).

In the case at bar, the notice of appeal filed by the petitioners contained both petitioners' names in the caption. Moreover, in the body of the Notice of Appeal, the individual case numbers assigned to the petitioners were

listed. (App. D). Although the Notice of Appeal was not technically correct, both petitioners' intention to seek review was manifested by naming both petitioners in the caption and by the designation of each petitioner by his case number.

It is also noteworthy that counsel for petitioners had previously filed a Notice of Appeal in a previous case, *G. Alfred v. United Parcel Services, Inc., et al.*, CA-91-3527 (5th Cir. 1992) on June 18, 1991. (App. E). In that case, the same styled Notice of Appeal was issued. However, not only did the Appellate Court accept the notice filed in *Alfred*, id, but the Appellate Court also entertained oral argument. Counsel for petitioners merely relied, to petitioners' detriment, on the fact that the Notice of Appeal was sufficient inasmuch as the Appellate Court accepted the same styled Notice of Appeal in a previous case.

The Appellate Court's second reason for declining jurisdiction was that the Notice of Appeal was filed prior to the entry of the Fed. R. Civ. P. 54(b) Order. However, the Appellate Court's decision is erroneous. According to Federal Rules of Appellate Procedure 4(a)(2) it states that "[e]xcept as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of judgment or order *shall* be treated as filed after such entry and on the day thereof" (emphasis added). The provisions of 4(a)(4) do not address the Rule 54 Order. The rule only applies to the disposition of post trial motions filed under Rule 50(b), Rule 52(b), and Rule 59. Moreover, the petitioners did not file any motions after the motion for a rehearing on September 19, 1991. The Rule 54(b) order was issued upon the Court's motion, not that of the petitioners.

The Appellate Court cited *Dibidale*, supra, as authority for the requirement of a second Notice of Appeal. However, the cases are distinguishable. In *Dibidale*, supra, the petitioner filed his notice of appeal with the Appellate Court. Subsequent to that filing, petitioner filed a motion for reconsideration. The court stated that by filing the motion the notice of appeal was ineffective but the defect was cured by a second notice filed post-argument. The court did not hold that a notice must be filed after a Rule 54(b) order to comply with Fed. R. App. P. 4(a)(2).

An understanding of Fed. R. App. P. 4(a)(2)(4) and this Court's holding in *Torres*, supra, clearly shows that the Appellate Court's decision in this case is contrary to both the Federal Rules of Appellate Procedure and the decisions of this Court.

CONCLUSION

For all the above and foregoing reasons this Court should remand this case to the Court of Appeals for the Fifth Circuit instructing it that it has jurisdiction to hear the appeal of petitioners.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3885
Summary Calendar

KENDALL STOCKSTILL,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

MANUEL T. MAYEUX,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-3259-J & 90-3260-J)

(February 28, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

We dismiss the appeal for want of jurisdiction. A notice of appeal was filed on October 16, 1991, but it was ineffective for two reasons: It fails to designate the party or parties taking the appeal, *see Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988), and it was filed prior to the entry of a Fed. R. Civ. P. 54(b) order that provided the parties with an appealable judgment, *see Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300, 304 (5th Cir. 1990).

In their reply briefs, the appellants claim that they filed a second notice of appeal on November 20, 1991, which was after the entry of the rule 54(b) judgment. But the district court has never received any such subsequent notice of appeal (even assuming that such notice would have satisfied the requirements of *Torres*). The appellants had thirty days from the entry of the rule 54(b) judgment to file an effective notice of appeal. As they have not done so, the appeal is DISMISSED for want of jurisdiction.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3885

KENDALL STOCKSTILL,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

MANUEL T. MAYEUX,

Plaintiff-Appellant,

versus

SHELL OIL CO., and COASTLINE CONSTRUCTION CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 30, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MANUEL T. MAYEAUX	CIVIL ACTION
VERSUS	No. 90-3259 c/w 90-3260 and 91-2527
SHELL OIL COMPANY and COASTLINE CONSTRUCTION, INC.	Section "J"

(Filed Nov. 7, 1991)

Partial Judgment under Rule 54(b)

Considering the Judgment entered in Civil Action No. 90-3260 on September 4, 1991,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Shell Oil Company and Coastline Construction, Inc., and against the plaintiff, Manuel T. Mayeaux, dismissing with prejudice the latter's suit in Civil Action No. 90-3260 at his cost.

This partial judgment is entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court having expressly determined that there is no just reason for delay in the entry of judgment as to Civil Action No. 90-3260 only.

New Orleans, Louisiana, this 6th day of November, 1991.

/s/ Patrick E. Carr
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY NOV. 8, 1991

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KENDALL STOCKSTILL AND MANUEL MAYEUX	*	CIVIL ACTION
	*	No. 90-3259
	*	c/w 90-3260
VERSUS	*	c/w 91-2527
SHELL OIL COMPANY and COASTLINE CONSTRUCTION COMPANY	*	Section J (4)
	*	(Filed Oct. 18, 1991)
	*	

NOTICE OF APPEAL

(This notice relates to civil action No. 90-3259 and 90-3260 only)

I hereby request an appeal be noticed in the above captioned matter.

/s/ Dan M. Scheuermann
Dan M. Scheuermann
Attorney at Law
Bar Roll No. 11767
405 St. Ferdinand Street
Baton Rouge, Louisiana 70802

ATTACHMENT 1

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GUERNEY ALFRED

VERSUS

UNITED PARCEL SERVICE, INC., ET AL

CIVIL ACTION
NO. 89-876-A

NOTICE OF APPEAL

I hereby request an appeal be noticed in the above captioned matter.

/s/ Dan M. Scheuermann
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92-21

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENDALL STOCKSTILL AND
MANUEL T. MAYEUX,
Petitioners,
v.
SHELL OIL COMPANY AND
COASTLINE CONSTRUCTION COMPANY,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Fifth Circuit act correctly in dismissing this appeal for want of jurisdiction?

2. Is a Notice of Appeal filed prior to the entry of a Fed. R. Civ. Pro. 54(b) order effective to properly appeal a case?

3. Does a Notice of Appeal which fails to designate the party taking the appeal contain a jurisdictional defect?

PARTIES TO THE PROCEEDING

1. Kendall Stockstill, Plaintiff in the District Court and Petitioner

2. Manuel T. Mayeux, Plaintiff in the District Court and Petitioner

3. Shell Oil Company,[1] Defendant in the District Court and Respondent (hereinafter referred to as "Shell")

4. Coastline Construction Inc., Defendant in the District Court and Respondent (hereinafter referred to as "Coastline")

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum and 40% by The "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENDALL STOCKSTILL AND
MANUEL T. MAYEUX,

Petitioners,

v.

SHELL OIL COMPANY AND
COASTLINE CONSTRUCTION COMPANY,

Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATION OF OPINIONS

The Minute Entry granting Summary Judgment entered on September 5, 1991 and the Partial Judgment under Rule 54(b) entered on November 8, 1991 by the

United States District Court for the Eastern District of Louisiana have not been reported.

The opinion dismissing the appeal for want of jurisdiction dated February 28, 1992 by the United States Court of Appeals for the Fifth Circuit has not been reported. A copy of the opinion is included in the appendix attached to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE RULES

This case involves Fed R. Civ. Pro. 54(b) and Fed. R. App. Pro. 3(c) and 4(a) (2).

FED. R. CIV. PRO. 54. JUDGMENT; COSTS

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment

adjudicating all the claims and the rights and liabilities of all the parties.

FED. R. APP. PRO. 3

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

FED. R. APP. PRO. 4

(a) Appeals in Civil Cases.

(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

STATEMENT OF THE CASE

Kendall Stockstill and Manuel T. Mayeux are former employees of Coastline, an independent contractor who supplies welding services to Shell under written agreements. In September, 1988, Shell informed Coastline that Manuel T. Mayeux would not be allowed to work at a Shell facility until he passed a physical exam. In October, 1988, Shell informed Coastline that Kendall Stockstill would no longer be allowed on Shell facilities. Shell had reason to believe that Stockstill had sexually harassed a female employee.

On September 11, 1990, Kendall Stockstill filed Civil Action No. 90-3259 in the United States District Court for the Eastern District of Louisiana against Shell and Coastline. (R.vol.1 nr.1 p.333). On September 11, 1990, Manuel T. Mayeux filed Civil Action No. 90-3260 in the United States District Court for the Eastern District of Louisiana against Shell and Coastline. (R.vol.3 nr.1 p. 297).

Both actions alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq, The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1000, et seq, and Title VII of the Civil Rights Act of 1964, (Title VII), 42 U.S.C. § 2000e, et seq. By Order dated April 19, 1991, the cases were consolidated. (R.vol.1 nr.11 p.303).

On June 5, 1991, Coastline filed a Motion for Summary Judgment on the ADEA, ERISA, and Title VII claims in consolidated Civil Actions No. 90-3259 and No. 90-3260. (R.vol.1 nr. 17 p.256.). On June 18, 1991, Stockstill and Mayeux filed a Memorandum in opposition to Coastline's Motion for Summary Judgment (R.vol.1 nr.21 p.238).

Meanwhile, on June 24, 1991, Kendall Stockstill filed a new suit based on the same facts against Shell in state court. This new suit (*Kendall Stockstill v. Shell Oil Co.*, No. 91-11914; in the Civil District Court for the Parish of Orleans, State of Louisiana) was removed to the United States District Court for the Eastern District of Louisiana and assigned Civil Action No. 91-2527. The new suit alleged defamation. By Order dated July 24, 1991, Civil Action No. 91-2527 was consolidated with Civil Action No. 90-3529 (R.vol. 1 nr.35 p. 163).

On July 2, 1991, Stockstill and Mayeux filed a Motion to Dismisss the Title VII claims in consolidated Civil Actions No. 90-3259 and No. 90-3260. (R.vol.1 nr. 25 p.230). The motion was granted on the same day. (R.vol.1 nr.25 p.232).

On July 16, 1991, Shell filed a Motion for Summary Judgment on the ADEA and ERISA claims in consolidated Civil Actions No. 90-3259 and No. 90-3260. (R.vol.1 nor.31 p.169). On July 26, 1991, Stockstill and Mayeux filed a Memorandum in Opposition to Shell's Motion for Summary Judgment. (R.vol.1 nr.38 p.1).

On September 5, 1991, the District Court issued a Minute Entry granting Summary Judgment in favor of Shell and Coastline on the ADEA and ERISA claims in consolidated Civil Actions No. 90-3259 and No. 90-3260. (R.vol.2 nr.41 p.576). Separate judgments were signed on the same day in favor of Shell and Coastline dismissing all claims made by Stockstill and Mayeux in Civil Actions No. 90-3259 and No. 90-3260. (R.vol.2 nr.42 and 43 p.574-575).

On September 19, 1991, Stockstill and Mayeux filed a "Petition for Rehearing." (R.vol.2 nr.45 p.424). Shell and Coastline responded to the petition. (R.vol.2 nr.46 and 47 p. 408-423). On October 10, 1991, the District Court issued a Minute Entry denying the petition. (R.vol.2 nr.50 p.357).

On October 16, 1991, a Notice of Appeal was filed in Civil Actions No. 90-3259 and No. 90-3260, even though these cases were still consolidated with Civil Action No. 91-2527. (R.vol.2 nr.51 p.356).

The docket for this appeal was completed and certified on November 7, 1991. On November 8, 1991, separate Partial Judgments under Rule 54(b) were entered in Civil Actions No. 90-3259 and No. 90-3260. Stockstill and Mayeux did not file Notices of Appeal from the Partial Judgments.

On February 26, 1992 the United States Court of Appeals for the Fifth Circuit issued an order dismissing the appeal for want of jurisdiction. The order noted that the Notice of Appeal failed to designate the party taking the appeal and was filed prior to the entry of a Fed. R. Civ. Pro. 54(b) order that provided the parties with an appealable judgment.

On March 30, 1992 the Fifth Circuit denied a Petition for Rehearing.

On June 29, 1992 Stockstill and Mayeux filed a Petition for Writ of Certiorari with this Court.

SUMMARY OF THE ARGUMENT

The Court of Appeals acted correctly in dismissing this appeal for want of jurisdiction. The Notice of Appeal was prematurely filed. It was filed after entry of summary judgments which did not dispose of all of the issues in the case. Later, the District Court filed Partial Judgments under Rule 54(b). However, the Petitioners did not file a second Notice of Appeal.

Additionally, the Notice of Appeal did not specify the party taking the appeal. This is a jurisdictional defect.

ARGUMENT

1. The Court of Appeals acted correctly in dismissing this appeal for want of jurisdiction.

(a) The summary judgments were not final decisions at the time a Notice of Appeal was filed.

The Petitioners sought review of summary judgments entered on September 5, 1991. The Petitioners asserted that the Court of Appeals had jurisdiction to hear their appeal under 28 U.S.C. § 1291. However, this statute confers jurisdiction only in the case of any appeal from a "final decision."

A final decision is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the Judgment. *Southern Methodist Univ. Ass'n. of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979). If a decision does not adjudicate all claims, the District Court must make an express determination that there is no just reason for delay and direct the entry of a Judgment in accordance with FED. R. CIV. PRO. 54(b) in order to allow an appeal.

The summary judgments entered on September 5, 1991 did not dispose of all issues in this case. At the time the summary judgments were issued, three Civil Actions (No. 90-3259, No. 90-3260 and No. 91-2527) had been consolidated. The summary judgments addressed claims raised in two of those actions (No. 90-3259 and No. 90-3260) but did not addressed the claims raised in No. 91-2527. Therefore, these summary judgments were not "final

decisions" within the meaning of 28 U.S.C. § 1291. Nevertheless, on October 16, 1991, a Notice of Appeal was filed.

The District Court did make an express determination that there was no just reason for delay and directed entry of a final judgment in accordance with Rule 54(b). However, this occurred on November 8, 1991, after the Petitioners had filed the Notice of Appeal. The Petitioners did not file a Notice of Appeal from the November 8, 1991 Partial Judgments.

The Court of Appeals acted correctly in dismissing the appeal for want of jurisdiction. A Notice of Appeal filed prior to the entry of a Rule 54(b) order is ineffective. The order dismissing the appeal is consistent with prior decisions of the Fifth Circuit and other Courts of Appeals.

A.O. Smith Corp. v. Sims Consol. Ltd., 647 F.2d 118 (10th Cir. 1981), involved claims, counter-claims, and cross motions for summary judgments. One Motion for Summary Judgment was granted and one was denied, leaving a claim for malicious prosecution pending in the District Court. Nevertheless the plaintiff filed a Notice of Appeal. The Tenth Circuit advised all parties that it was considering a dismissal for lack of appellate jurisdiction. The plaintiff then requested that the appeal be held in abeyance pending a request for a Rule 54(b) certification. The District Court made a Rule 54(b) certification and the plaintiff filed a Second Notice of Appeal within 30 days thereof. The filing of the Second Notice of Appeal saved the plaintiff's appeal. Had the plaintiff not filed the second notice, the Court of Appeals would have lacked jurisdiction to hear the appeal.

Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans, 916 F.2d 300 (5th Cir. 1990), involved

multiple suits arising from the default on a large construction loan. Dibidale filed suit in federal court against the two lending banks and various individuals for violation of various banking regulations. Dibidale Security Establishment (DSE), the parent of Dibidale, filed a similar suit. One of the banks filed a state court action against an agent of Dibidale as a guarantor of the loan. The state case was removed to federal court and all three cases were consolidated. The District Court granted summary judgment in favor of the defendants on the suits filed by Dibidale and DSE but did not certify the judgment in accordance with Rule 54(b). Dibidale filed a Notice of Appeal.

While the case was on appeal and after oral arguments to the Fifth Circuit, the District Court issued an appropriate Rule 54(b) Judgment. Dibidale then filed a second Notice of Appeal.

The Fifth Circuit raised the question of whether it had appellate jurisdiction prior to certification. The decision makes clear that the first Notice of Appeal was ineffective because there was no "final decision" absent certification. Dibidale's appeal was saved only by the filing of the second notice within 30 days of the entry of the Rule 54(b) judgment.

> "Subsequent to the filing of briefs on the merits of this case we requested supplemental letter briefing on appellate jurisdiction. Specifically, we inquired whether certification of the judgment from which Dibidale had appealed was required under FED. R. CIV. P. 54(b) and, if certification

> was not required or was otherwise obtained, whether Dibidale's motion for reconsideration rendered its earlier notice of appeal ineffective under F.R.A.P. 4(a)(4). As noted, the district court's subsequent issuance of a certified judgment pursuant to Rule 54(b), and Dibidale's subsequent timely appeal have rendered the first portion of this issue moot.
>
> The appellees contend nonetheless that the Rule 54(b) certification must apply retroactively to the district court's original judgment, thus rendering Dibidale's earlier notice of appeal premature and its most recent notice of appeal untimely. We are not persuaded. Until the issuance of the qualifying Rule 54(b) judgment, no final judgment existed from which Dibidale could take an appeal. Accordingly, Dibidale's notice of appeal from the district court's post-argument judgment properly has invoked our jurisdiction." 916 F.2d at 304 (emphasis added).

The present case is similar to *Dibdale*. This case also involves two cases filed in federal court and one filed in state

court. The state court claim was removed to federal court and all three cases were consolidated. The summary judgments dealt with issues raised in the cases originally filed in federal court but did not dispose of the issues raised in the removed case. The summary judgments were not "final decisions" and no Rule 54(b) certification was made prior to the Notice of Appeal. Therefore, at the time the notice was filed, no final judgment existed from which the Petitioners could take an appeal.

A Rule 54(b) certification was made in this case. However, it was issued after the Notice of Appeal. The Petitioners failed to file a Notice of Appeal from the Partial Judgments under Rule 54(b). Therefore, The Fifth Circuit had no jurisdiction to hear this appeal.

The Petitioners could have saved their appeal by filing a second Notice of Appeal after entry of the partial judgments as was done in *A.O. Smith Corp. v. Sims Consolidated Ltd., supra*, and *Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans, supra*. However since the Petitioners failed to file a second Notice of Appeal, this appeal was properly dismissed.

The Petitioners attempt to excuse the premature filing of the Notice of Appeal by pointing to Fed. R. App. Pro. 4(a) (2) which provides that a notice of appeal filed after an announcement of a decision but before entry of judgment shall be treated as filed after the entry of judgment.

However, Rule 4(a) (2) relates to a decision that will be final on entry. It does not make appealable an order that is not appealable under 28 U.S.C. § 1291. 9 Moore's Federal Practice ¶ 204.14.

"Nor does Rule 4(a) (2) save

> an appeal that is taken from an order appealable only on a finding under Rule 54(b)." *Id.* at p. 4-129 (footnote omitted).

The Court of Appeals acted correctly in dismissing this appeal for failure to timely file a notice of appeal after entry of the partial judgments under Rule 54(b).

(b) The Notice of Appeal contained a jurisdictional defect.

Under Rule 3(c) of the Federal Rules of Appellate Procedure, there are only three requirements for the contents of a Notice of Appeal.

> "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

The Notice of Appeal filed by the Petitioners met none of these requirements. (R.vol.1 nr.51 p.356). The notice did not specify the party or parties taking the appeal, did not designate the judgment or order appealed from and did not name the court to which the appeal was taken.

The defects regarding designation of the judgment appealed from and the court to which the appeal is taken were not fatal because of the last sentence of Rule 3(c).

> "An appeal shall not be

> dismissed for informality of form or title of the notice of appeal."

However, the failure to specify the party taking the appeal was a jurisdictional defect which resulted in the dismisssal of this appeal. The order dismissing the appeal is consistent with prior decisions of the Supreme Court and the Fifth Circuit.

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), Torres was one of sixteen plaintiffs who intervened in an employment discrimination suit. The District Court dismissed the complaint for failure to state a claim upon which relief may be granted. The plaintiffs appealed but the Notice of Appeal omitted Torres' name due to a clerical error. The United States Court of Appeals for the Ninth Circuit reversed the dismissal and remanded the case.

Upon remand, the defendant moved for a partial summary judgment against Torres on the grounds that the prior judgment of dismissal was final as to Torres for his failure to appeal. The District Court granted the motion and the Ninth Circuit affirmed.

The Supreme Court held that the failure to specifically name a party in the Notice of Appeal was a jurisdictional defect that did not allow the Court of Appeals to exercise jurisdiction over the unnamed party. Justice Marshall, writing for the majority, explained the Supreme Court's reasoning as follows:

> "We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals

were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the rules do not grant courts the latter power, we hold that the rules likewise withhold the former." 487 U.S. at 315.

"Applying these principles to the instant case, we find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal." 487 U.S. at 317.

Torres argued that the Notice of Appeal was not defective as to him since it included the phrase "et al." The Supreme Court rejected this argument.

> "Petitioner urges that the use of "et al." in the notice of appeal was sufficient to indicate his intention to appeal. We cannot agree. The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal." 487 U.S. at 317-18.

The Fifth Circuit applied *Torres v. Oakland Scavenger Co., supra*, to determine that it had jurisdiction only over the specifically named appellants in a Notice of Appeal in *Barnett v. Petro-Tex Chem. Corp.*, 893 F.2d 800 (5th Cir. 1990), even though the notice named the first appellant followed by "et al." Strict compliance with the first provision of Rule 3(c) is a jurisdictional requirement.

In the present case the Notice of Appeal failed to specify any party whatsoever. The notice reads in its entirety are follows:

> "I hereby request an appeal be noticed in the above captioned matter."

There was no attempt to identify "I". The attorney who signed the notice did not even state who he represented. The Notice of Appeal was defective for failure to specify the party appealing. This defect was jurisdictional and the appeal was properly dismissed.

The Petitioners acknowledge that the notice was not "technically correct" but seek to excuse their lack of compliance with the rules of procedure by pointing out that the notice included the following statement.

> "This notice relates to Civil Action No. 90-3259 and 90-3260 only."

This statement hardly clarifies the confusion. The two civil actions had been consolidated. There were two plaintiffs. The statement does nothing to identify which of the two plaintiffs was the "I" requesting the appeal.

The Petitioners also point out that their lawyer had previously filed an identical Notice of Appeal in another case. No one complained in that case. However, there was only one plaintiff. Therefore there was no confusion as to the party requesting the appeal. Such is not the case where, as here, there is more than one plaintiff.

CONCLUSION

This case does not involve a conflict with any decision of the Supreme Court. Nor does it involve a conflict between decisions of the Court of Appeal.

This case involves a failure to follow the applicable rules of procedure in noticing an appeal.

The Court of Appeals acted correctly in dismissing this appeal for want of jurisdiction. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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